SUPREME COURT, U. S.

FILED

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 865

HUN CHAK SUN, also known as Jack Sun,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which sustained an order of the Board of Immigration Appeals holding petitioner ineligible for adjustment of status.

OPINIONS BELOW

The Opinion of the Court of Appeals has not as yet been officially reported, but is set forth in Appendix A hereto. The relevant opinion of the Board of Immigration Appeals is set forth in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1969 (Appendix B, hereto). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

1. Whether the criteria upon which the discretion was denied excluded from consideration relevant factors and imposed additional conditions contrary to the purpose of this remedial legislation.

STATUTES INVOLVED

Section 245 of the Immigration and Nationality Act:

> "Adjustment of status of nonimmigrant to that of person admitted for permanent residence; record; natives of contiguous country or adjacent island.
>
> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.
>
> (b) Upon the approval of an application for adjustment made under subsection (a) of this

section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference or nonpreference visas authorized to be issued under section 1153(a) of this title within the class to which the alien is chargeable, for the fiscal year then current.

(c) The provisions of this section shall not be applicable to any alien who is a native of any country of the Western Hemisphere or of any adjacent island named in section 1101(b)(5) of this title."

Act of June 27, 1952, 66 Stat. 214, as amended Aug. 21, 1958, Public Law 85-700, § 1, 72 Stat. 699; July 14, 1960, Public Law 86-648, § 10, 74 Stat. 505; Oct. 3, 1965, Public Law 89-236, § 13, 79 Stat. 918.

STATEMENT OF THE CASE

Petitioner was born at Canton City, Kwangtung Province, China on June 26, 1929. He was last a resident of Taiwan—having fled from the Mainland of China immediately prior to the Communist take-over of his then place of residence. His one and only admission to the United States occurred at the Port of Agana, Guam on August 18, 1956, at which time he was admitted as a nonimmigrant government employee for the duration of his status. From about 1950 to 1956, prior to petitioner's admission to the

United States, he was attached to the Research Staff of the National Security Bureau of the Republic of China on Taiwan.

In September, 1957, petitioner went to work for California Color Corporation, which is presently known as Technicolor Corporation, at San Francisco, California where he is still employed as an electronic engineer.

On April 24, 1964, the Board of Immigration Appeals dismissed petitioner's appeal—affirming an order of the Special Inquiry Officer denying his adjustment of status to that of a lawful permanent resident under Section 245 of the Immigration and Nationality Act (8 USCA 1255), which application was founded on his qualifications as an electronic engineer (R. 195).

In July, 1964, the Board of Immigration Appeals denied petitioner's motion to reopen the deportation proceedings to afford him an opportunity to apply for a stay of deportation under Section 243(h) of the Immigration and Nationality Act (8 USC 1253(h)) (R. 171).

On October 26, 1966, the Board of Immigration Appeals once again denied a motion to reopen the proceedings by petitioner in order to afford him an opportunity to file an application for suspension of deportation under the provisions of Section 244(a)(1) of the Immigration and Nationality Act, (8 USCA 1254(a)(1)), without a hearing—holding that favorable exercise of the discretion to grant suspension of deportation is not merited (R. 66).

On July 10, 1967, the petitioner married a native-born citizen of the United States. A visa petition filed in behalf of petitioner, to accord him immediate relative status, was approved by the District Director at San Francisco, California on October 20, 1967 (R. 63).

On February 8, 1968, the Board of Immigration Appeals directed that the case be reopened for the purpose of considering petitioner's application for adjustment of status under Section 245 of the Immigration and Nationality Act based upon his marriage to a United States citizen (R. 49). Said application was denied by a Special Inquiry Officer at San Francisco, California on July 8, 1968 (R. 13), and affirmed by the Board of Immigration Appeals on October 31, 1968—holding that even though it is assumed that the petitioner is statutorily eligible "his case is not a meritorious one with outstanding equities which would warrant the granting of discretionary relief" (R. 1, App. C).

The present action was filed seeking review of the administrative proceedings had in this case.

REASONS FOR GRANTING THE WRIT

The decision below presents important questions affecting the exercise of discretion by the Immigration and Naturalization Service in adjusting the status of deportable aliens to that of lawful permanent residents of the United States.

The immigration administrative decision is subject to judicial review where the proceedings have not

conformed to the traditional standards of fairness required by the due process of law clause of the Fifth Amendment to the Constitution of the United States. *Japanese Immigrant Case,* 189 U.S. 86; *Vajtauer v. Commissioner of Immigration,* 273 U.S. 103; *Wong Yang Sung v. McGrath,* 339 U.S. 33; *Kwong Hai Chew v. Colding,* 344 U.S. 590. Or where there has been arbitrariness or abuse of discretion by the administrative agency. *Low Wah Suey v. Backus,* 225 U.S. 460; *Kwock Jan Fat v. White,* 253 U.S. 464; *Carlson v. Landon,* 342 U.S. 524; *Yaris v. Esperdy,* 202 F2d 109, 112. The same general rule applies to determine whether or not the law has been correctly applied. *Gegiow v. Uhl,* 239 U.S. 3; *Kessler v. Strecker,* 307 U.S. 22; *Bridges v. Wixon,* 326 U.S. 135; *Fong Haw Tan v. Phelan,* 333 U.S. 6; Cf. *McGrath v. Kristensen,* 340 U.S. 162.

The questions raised in the instant proceeding are clearly the subject of inquiry. Rejection of an application by administrative fiat when it fails to comply with the statutory mandate is a denial of vital rights guaranteed by the Constitution and laws of our nation.

The Board, in its decision, concedes that the petitioner is statutorily eligible but refuses to exercise its discretion because the case "is not a meritorious one with outstanding equities" (R. 3). As was stated by the Court of Appeals for the Second Circuit in *Tibke v. Immigration and Naturalization Service,* 335 F2d 42, at page 47, "In enacting the 1960 amendment to

Section 245, Congress had the objective of 'providing considerable more flexibility in the administration of the law.' Sen. Rep. No. 1651, 1960, 2 U.S. Code Cong. and Adm. News, p. 3147. Such a remedial provision should not be construed strictly."

While it is recognized that the scope of review of an administrative determination is limited, such administrative action is not completely beyond the scope of judicial scrutiny. The Court can intervene where there is an abuse of discretion, lack of procedural due process or where a finding required by the statute is unsupported by reasonable, substantial or probative evidence.

Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963);

Asghari v. Immigration and Naturalization Service, 396 F2d 391 (9 Cir., 1968);

Wong Wing Hang v. Immigration and Naturalization Service, 360 F2d 715 (2 Cir., 1966).

"A Court could say that the Attorney General had transgressed the statute," if it "affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant."

Kaloudis v. Shaughnessy, 180 F2d 488, 490-91, (2 Cir., 1950).

We are not here involved with a case relating to national security. We are confronted with a situation involving the interest of a foreign government seeking return of its national which must be regarded as

political in nature. The request of the foreign government is not a determinant prescribed by statute or regulations, nor is it deserving of the weight accorded it by the Board and the Court of Appeals. The issue is—does the request of such foreign government take precedent over other factors which clearly indicate that enforced departure of the petitioner, solely for the purpose of obtaining an immigrant visa to lawfully reenter the United States, would cause petitioner and his United States citizen spouse unusual and unwarranted hardship. The weight accorded the foreign government request seems patently wrong. Political behavior which is not contrary to the interests of our government is a factor which should be given consideration in reaching a determination whether enforced departure would result in extreme hardship.

On January 20, 1969, while dissenting to denial of a petition for writ of certiorari seeking review of a physical persecution claim, Mr. Justice Douglas stated:

> "Formosa's intolerance of criticism is well known. Lei Chen, after a one-day military trial, was sentenced to 10 years for trying to form a non-Communist political party in opposition to the Kuomintang. Military trials of men expressing 'radical' ideas are common. The pressures to conform to Kuomintang orthodoxy are so great that no more than 5% of the students who go abroad to study return to Formosa.
>
> "These petitioners, who have denounced the Chiang Kai Shek regime as a 'police state,' will

> most assuredly either face a firing squad on their return or receive heavy sentences. Any person critical of the regime is called a 'defector.' The list of political victims of Taipei's intolerance is too long and the secret military trials of dissidents too notorious for me to acquiesce in denial of certiorari here."
>
> No. 785, *Cheng Fu Sheng v. Immigration and Naturalization Service,* 37 Law Week 3263.

Petitioner's United States citizen spouse testified that she is employed at the Franklin Hospital in the City and County of San Francisco, State of California, as a medical technologist (R. 33); that she has never been out of the United States and that she does not speak Chinese (R. 35); and that if it is necessary for petitioner to leave the United States that it is her intention to leave with him and that such departure would cause her hardship (R. 35-36).

As indicated in the Statement of the Case, petitioner has been employed by one firm as an electronic engineer for more than the past 11 years. Recent releases of the Department of Labor clearly indicate that electronic engineers and medical technologists are in short supply in the United States and on a pre-certified list and that aliens with such occupation classifications are entitled to the required labor certifications. Petitioner is eligible for a visa. Petitioner can only travel outside of the United States if he can obtain a valid travel document. In order to proceed abroad for the purpose of obtaining a visa to law-

fully reenter the United States his travel abroad for that purpose will be governed by the Republic of China on Formosa. It is clear that if petitioner returns to Formosa, the government there will not issue him a document for travel outside of that area, and there is reason to believe, for the reasons set forth in the excerpt from Mr. Justice Douglas dissenting opinion, supra, that petitioner will be detained in Formosa for a considerable period of time.

The foregoing consequences have been given no consideration by the Board or the Court of Appeals in their decisions. It is beyond doubt that both petitioner and his United States citizen spouse will suffer as a result of such adverse decisions—exactly that which Congress sought to avoid when enacting this remedial legislation.

CONCLUSIONS

It was the purpose and intent of Section 245 of the Immigration and Nationality Act to prevent for humanitarian reasons deportation or enforced departure of worthy aliens who meet the legal qualifications for lawful permanent resident status in the United States. The decisions below refuse to consider all of the factors which establish petitioner's qualifications for such relief. This was a denial of a vital right guaranteed by the Constitution and laws of the United States.

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated, San Francisco, California,
November 14, 1969.

JOSEPH S. HERTOGS,
Attorney for Petitioner.

(Appendices A, B and C Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 23,658

HUN CHAK SUN, also known as Jack Sun,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

[August 27, 1969]

On Petition to Review an Order of the Immigration and Naturalization Service

Before: MADDEN, Judge of the United States Court of Claims, and ELY and CARTER, Circuit Judges.

ELY, Circuit Judge:

The petitioner vigorously challenges a final administrative order of the respondent, denying his application for adjustment of status to that of a lawful permanent resident of the United States. Section 245 of the Immigration and Nationality Act ("the Act") (8 U.S.C. § 1255).

The petitioner, a citizen of the Republic of China, entered this Country on August 18, 1956. His wife and two children remained in Taiwan. His original entry had been gained by reason of his status as a non-immigrant employee of his own government. When that status terminated, he was directed to return to his Country and was granted time, until April 7, 1963, within which to do so. He failed to depart, whereupon there issued an Order to Show Cause in deportation proceedings. The alien conceded deportability at the hearing and applied for status as a permanent resident under section 245. The Special Inquiry Officer denied the application, the Board of Immigration Appeals ("the Board") affirmed the denial on April 24, 1964, and a deportation warrant was issued on the following June 6th. Three days later, the petitioner moved the Board to reopen the proceedings so that he might apply for relief under section 243(h) of the Act (8 U.S.C. § 1253(h)) on the ground that he, if deported, would be subjected to persecution. The motion was denied. Thereafter, on April 30, 1966, the petitioner moved to reopen the proceedings for the purpose of applying for suspension of deportation under section 244(a)(1) of the Act (8 U.S.C. § 1254 (a)(1)) and for temporary withholding of deportation under section 243(h) of the Act (8 U.S.C. § 1253(h), *as amended,* (8 U.S.C. § 1253(h)(Supp. I, 1965)). The Board granted petitioner's request that there be oral argument, and after hearing the same, the Board, on October 26, 1966, denied this motion. On July 10, 1967, the petitioner married an American citizen, and in the following November filed a motion

to reopen the proceedings to apply for relief under section 245. The motion was granted, and a hearing was conducted on March 13, 1968. After the hearing, the Special Inquiry Officer denied the application, and the Board of Immigration Appeals dismissed the appeal. The Petition for Review was then filed in our court. We mention, in passing, that a part of the petitioner's success in so long resisting the Government's efforts is attributable to a succession of Congressional bills introduced for his private relief.

Only two contentions are here presented: (1) That the Board of Immigration Appeals abused its discretion in denying the relief sought under section 245; (2) That the petitioner's due process rights were infringed by the Board's denial, on October 26, 1966, of the motion to reopen the proceedings to permit the petitioner to seek suspension of deportation under section 244(a)(1).

Petitioner's counsel has ably presented the contentions, both in writing and in oral argument, but we must reject them. As to the second contention, the Board, although denying the motion to reopen the proceedings, heard the argument of petitioner's counsel and, as indicated by its decision and order, carefully considered the contentions made by the petitioner in writing and certain affidavits which were submitted in connection therewith. Whether to grant reopening rests within the sound discretion of the Board. *Greene v. I&NS,* 313 F.2d 148 (9th Cir.), *cert. denied,* 374 U.S. 828 (1963). On the record before us we cannot see that this discretion was abused. To the

contrary, it is our opinion that the Board has, through all the years, considered the petitioner's claims with the utmost fairness.

For even more solid reasons, the petitioner's first contention is without merit. In reviewing the denial of relief under section 245, we cannot overturn a determination adverse to an alien unless we can say that the Board has abused its discretion, operating capriciously, arbitrarily, or with manifest unfairness. *Cubillos-Gonzalez v. I&NS,* 352 F.2d 782 (9th Cir. 1965); *Cabrera v. I&NS,* ..... F.2d ..... (9th Cir. Aug. ....., 1969). We need not review all of the facts which are disclosed in the record and all of the considerations which doubtless led to the denial of the section 245 application. Suffice it to say that they afford such justification for the challenged decision that it would be highly improper for us to hold that the broad discretion vested in the Board has been abused.

Affirmed.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 23658

HUN CHAK SUN, also known as Jack Sun,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

JUDGMENT

Upon Petition to Review an order of the Immigration and Naturalization Service

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service

and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is affirmed.

Filed and entered August 27, 1969

Appendix C

U. S. Department of Justice
Board of Immigration Appeals

File: A-10767108—San Francisco

In re: Sun Hun Chak

In Deportation Proceedings

Appeal

Oral Argument: August 20, 1968

On behalf of respondent:

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On behalf of I&N Service:

R. A. Vielhaber, Esq.
Appellate Trial Attorney

Stephen M. Suffin, Esq.
Trial Attorney
(Brief filed)

Charges:

Order: Sec. 241(a)(2), I&N Act (8 USC 1251 (a)(2))—Nonimmigrant (government employee)— remained longer

Lodge: None

Application: Permanent resident status under section 245, I&N Act

The case is before us on appeal from the decision of the special inquiry officer rendered on July 8, 1968, in which he denied respondent's application for adjustment of status to that of a permanent resident under section 245, Immigration and Nationality Act, and granted respondent the privilege of voluntary departure with an alternate deport order to the Republic of China on Formosa. This case is not a stranger to the Board, as the instant appeal brings these proceedings before us for the fifth time.

The respondent is a 39-year-old married male alien, a native and citizen of China, who was admitted to the United States at Guam on August 18, 1956, being then admitted as a nonimmigrant government employee for the duration of status. He was then employed by the Ministry of Communications of the National Security Bureau of the Republic of China, having been employed in this government job since 1953. The following facts are amply sustained by the record. His employer in 1956 gave him permission to go to the United States for two years to study radio engineering and while he was in the United States his salary was to be paid to his then wife who was living in Formosa, which was done for a period of time (Ex. 8). His employer, hereinafter referred to as the Bureau, advanced sums of money to the respondent for tuition, travel and living expenses, etc. (Ex. 8). However, after being in the United States for approximately a year, in September 1957 he obtained employment as an engineer with a private corporation, the California Color Corporation. He did not

inform the Bureau that he had done this and in the following year, 1958, he requested the Bureau to extend his stay in the United States for an additional year so that he could complete his studies in radio engineering. This was granted but he did not take any studies in radio engineering but rather took courses which would assist him in his work with the California Color Corporation.

In July 1960, although he had no intention of returning to Formosa and had not been taking any courses in radio engineering, he wrote to the Bureau that his studies would terminate in August and that he would return to Formosa in September. As a consequence, he obtained $500.00 from the Bureau for traveling expenses (Ex. 8).

Since the respondent had failed to maintain his status as a nonimmigrant government employee, he was granted until April 7, 1963 within which to depart voluntarily from the United States. He did not depart as required. He has thus been under a final order of deportation since the special inquiry officer's decision of September 26, 1963. The record establishes deportability by evidence that is clear, unequivocal and convincing. The respondent has been able to remain in the United States by reason of the filing of numerous appeals and motions and principally by having a series of private bills on his behalf introduced into the Congress. At this time it does not appear that there is a private bill pending.

In respondent's appeal he states in effect that grave consequences will result to him if he were to return

to Formosa. Accompanying the appeal is also much material concerning conditions in Formosa today which respondent feels would cause him great harm. Respondent's plea that he would be persecuted if he were to return to Formosa was turned down by this Board on July 13, 1964, and on December 26, 1966 we denied a motion for reopening to give further consideration to this question. The instant appeal is from the denial of his application for adjustment of status under section 245 of the Act and the question of whether respondent would be persecuted if he returned to Formosa is not before the Board at this time.

Turning our attention now to his application for adjustment of status under section 245 of the Immigration and Nationality Act, we are in complete agreement with the conclusion of the special inquiry officer that his application should be denied as a matter of discretion. Assuming that he is statutorily eligible, his case is not a meritorious one with outstanding equities which would warrant the granting of discretionary relief.[1] It is not necessary for us to detail at this time the many facts which militate against the application for adjustment of status. It is enough to say that a very careful review of the entire record including the hearing testimony convinces us that the respondent has been less than candid on numerous occasions and that his testimony has been contradictory and evasive and especially the so-called

[1] *Matter of Leger*, 11 I&N Dec. 796; *Matter of Ortiz-Prieto*, 11 I&N Dec. 317.

"facts" set forth in his affidavit of August 20, 1968. As one example, the respondent in his affidavit on page three states:

> "My family was under the pressure of the Taiwan Government constantly. Because for fear of their life, my wife Annie filed a divorce against me, therefore setting them free from me and gain their own freedom."

Compare these statements with his testimony given at the hearing on March 13, 1968 (Tr. of hearing, p. 99).

Lines 11-14:

> Q. What happened to this marriage?
>
> A. Since I was over in the States for over 12 years, so she felt like I deserted the family, that's all, so she asked for a divorce. I agreed to it.

Lines 21-25:

> Q. And did your wife go through divorce proceedings in Taipei?
>
> A. Yes.
>
> Q. Now you tell us that the reason for this divorce was because you were separated from your wife for such a long period of time, is that right?
>
> A. Yes.

In his opinion, the special inquiry officer stated that the respondent had testified falsely before him about certain phases of the case (p. 2), and the record sustains this assertion.

In reaching our decision to deny relief under section 245 on the basis of administrative discretion, we take note of and give appropriate weight to three letters entered into the record. The first is from the Department of State (Ex. 4), dated December 18, 1962. The second is from the Consul General of the Republic of China at San Francisco (Ex. 5), dated January 24, 1963. The third letter is from the Chief, Field Operations Division, Visa Office, Department of State (Ex. 12), dated December 29, 1967. These letters indicate that respondent came to the United States as an employee of the government of the Republic of China to take advanced training in communications; that he was advanced money by his government, some of which was obtained under circumstances amounting to fraud; that he misled his government as to his activities in the United States; that he breached an agreement with the Republic of China that he would return to Formosa and resume his employment with the Ministry of Communications to give the government the benefit of his training; and finally, that if the respondent was permitted to remain in the United States it would have a harmful effect upon relations between the Republic of China and the United States.

Counsel alleges that these letters should not have been admitted into evidence because there was no opportunity to cross-examine those persons who had written them. This is not the law. In a very recent case, *Hosseinmardi v. Immigration and Naturalization Service,* 391 F.2d 914, decided March 22, 1968, the United States Court of Appeals for the Ninth

Circuit held that a special inquiry officer in adjudicating an application for a temporary stay of deportation under section 243(h) of the Act, may consider a letter from the Department of State without giving the alien the opportunity to cross-examine the author of the letter. In a similar but earlier case, *Namkung v. Boyd,* 226 F.2d 385 (C.A. 9, 1955), the court held that a letter from the Consul General of a foreign country, relative to a section 243(h) application could be considered without affording the opportunity for cross-examination. These cases are on all fours with the facts in the instant case.

In spite of being under a final order of deportation since 1963, the respondent has been able to remain in this country through the use of every dilatory tactic both administrative and judicial open to him. The fact that he is now married to an American citizen, having contracted that marriage on July 10, 1967 while under a final order of deportation, does not, as was stated in *Matter of D-F-,* 4 I&N Dec. 589, evoke the sympathetic consideration to which it might otherwise be entitled.

We find the equities in this case insufficient to warrant the favorable exercise of discretion in respondent's behalf in connection with his application for adjustment of status under section 245 of the Act. On the contrary the file is replete with evidence that respondent is not entitled to this relief as a matter of administrative discretion.

Accordingly, we will dismiss the appeal. We do this, however, without prejudice to respondent's right to

submit any new or additional evidence or legal arguments relative to obtaining relief from deportation. We wish to emphasize that any further evidence or arguments which might be forthcoming must be new and not heretofore considered by the Board in the five times the case has been before us.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Chairman